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No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH N. ALEXANDER; FREDEAN HAMMER;
the STATE OF MINNESOTA;
and BECKER COUNTY, MINNESOTA,
Cross-Petitioners,

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS;
UNITED STATES OF AMERICA; COUNTIES OF
MAHNOMEN and CLEARWATER, MINNESOTA;
and ELMER H. WINTER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CROSS-PETITION OF JOSEPH N. ALEXANDER; FREDEAN HAMMER; STATE OF MINNESOTA; AND BECKER COUNTY, MINNESOTA

WARREN SPANNAUS
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Counsel of Record
Special Assistant Attorney General
Third Floor, Centennial Building
St. Paul, MN 55155
Telephone: (612) 296-3294
Counsel for Cross-Petitioners

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether a fundamental change in interpretation of the critical surplus land act begun by a District Court just prior to the state court decision at issue, but only subsequently adopted by the Circuit Court of Appeals and more fully expanded in later litigation, constitutes a sufficient change in law to preclude application of collateral estoppel on the basis of that state court decision.

II.

Whether the doctrine of collateral estoppel should be applicable where the essential purposes of the doctrine and related considerations are not substantially served by its application.

(The above questions are identical to those presented in the Petition for Certiorari filed September 10, 1982, by Mahnomen and Clearwater Counties, Minnesota, and Elmer H. Winter, et al.)

LIST OF ALL PARTIES

The parties to the proceeding in the United States Court of Appeals for the Eighth Circuit were as follows: White Earth Band of Chippewa Indians; United States of America; Joseph N. Alexander, Commissioner of Natural Resources for the State of Minnesota; Fredean C. Hammer, Director of the Division of Enforcement and Field Service for the Minnesota Department of Natural Resources; the State of Minnesota; the Counties of Mahnomen, Clearwater, and Becker, Minnesota; Elmer H. Winter; Kenneth Albertson; Joe Klinkbomme; and Ed Grahame.

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State of Minnesota v. Clark, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980) 4, 6, 7

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Joseph N. Alexander, Fredean C. Hammer, State of Minnesota, and Becker County, respectfully pray, for the limited reasons as set forth herein, that a writ of certiorari issue to reveiw the judgment of the United States Court of Appeals for the Eighth Circuit entered May 14, 1982.

OPINIONS BELOW

The District Court issued an order on May 30, 1980, which precluded on the basis of collateral estoppel the litigation of certain issues in this case. The order is not published, but is included in the Appendix (pp. 47a-51a) to the Petition for Certiorari filed in this case by Mahnomen and Clearwater Counties, et al.[1] The District Court issued its opinion on the merits on June 25, 1981, reported at 518 F. Supp. 527. The Court of Appeals issued its opinion on appeal May 14, 1982, —— F.2d ——. The June 25, 1981 District Court opinion is included as pp. 23a-46a of the Petition for Writ of Certiorari filed by Mahnomen and Clearwater Counties, et al., and the May 14, 1982 Court of Appeals opinion is included as pp. 1a-22a of that Petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Judgment of the Court of Appeals was entered on May 14, 1982. Upon the petition of the Mahnomen, Clearwater, and Becker Counties, and Elmer H. Winter, et al., this Court extended the time to file a Petition for Writ of Certiorari until September 11, 1982. This Cross-Petition is filed under Rule 19.5 of the Rules of the Supreme Court. The Petition for Writ of Certiorari filed by the Mahnomen and Clearwater Counties, et al., was received by the cross-petitioners on September 13, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

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[1] The Petition filed by Mahnomen and Clearwater Counties, et al., on September 10, 1982, contains a complete Appendix as required by the Rules of this Court. This Cross-Petition adopts that Appendix, and will not include herein copies of the same documents that were reproduced in that Appendix.

THE STATUTE INVOLVED

The primary statute involved in this case is the Act of January 14, 1889 (25 Stat. 642), also known as the Nelson Act. The Act is reproduced in relevant part at pp. 52a-54a of the Petition for Writ of Certiorari filed by Mahnomen and Clearwater Counties, et al.

STATEMENT OF THE CASE

The case began in March of 1974 when the White Earth Band of Chippewa Indians sued the Minnesota Commissioner of Natural Resources and other Minnesota officials asking for broad declaratory and injunctive relief relating to State and Band hunting and fishing jurisdiction over Indians and non-Indians on all lands within the White Earth Indian Reservation as created in 1867. Thereafter, the United States sued the State of Minnesota solely over the extent of State hunting and fishing jurisdiction over Band members within the reservation. The cases were consolidated by the District Court. The Minnesota Counties of Mahnomen, Clearwater, and Becker, as well as four individuals, were permitted by the District Court to intervene as defendants in the action initiated by the White Earth Band. The Minnesota State defendants will be referred to here collectively as the State. The County and individual defendants will be referred to here individually. Jurisdiction was vested in the District Court pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (White Earth Band as plaintiff), and 28 U.S.C. § 1345 (United States as plaintiff).

The District Court deferred trial on the lawsuits until some of the claims of the White Earth Band and United States (re-

lating to State jurisdiction over Band members on the reservation) were litigated in the state court system. Those claims, which involved the extent of State hunting and fishing jurisdiction over Band members within thirty-two townships of the original thirty-six township reservation, were finally resolved by the Minnesota Supreme Court in the consolidated cases of *State of Minnesota v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980). The issues left unresolved by the state court litigation were then addressed by the District Court. By order of May 30, 1980 (unpublished), the District Court precluded relitigation of issues that had been decided by the Minnesota Supreme Court ruling in *State of Minnesota v. Clark, supra.*

After the preparation by the parties of extensive documentary exhibits and factual stipulations, and after briefing and oral argument, the District Court issued its ruling on the remaining issues in the case on June 25, 1981, reported at 518 F. Supp. 527. The court ruled that (1) four townships of the original thirty-six township reservation had been ceded and disestablished; (2) the Band may limit or condition entry upon trust lands by non-member hunters and fishermen pursuant to federal trespass law, 18 U.S.C. § 1165, and (3) the State may continue to regulate hunting and fishing by non-members of the Band anywhere within the reservation.

After the final District Court judgment, Mahnomen, Clearwater, and Becker Counties, and Elmer H. Winter, et al., appealed to the Court of Appeals the order of May 30, 1980, which precluded the parties from litigating the issue of the disestablishment of thirty-two townships out of the original thirty-six township White Earth Reservation. The State then also filed a Notice of Appeal of the May 30 order, stating that the appeal was for the "sole and limited purpose of preserving

Defendants' rights from *res judicata* under the case of *Federated Department Stores, Inc. v. Moitie,* [452 U.S. 394], 101 S.Ct. 2424 (1981), if the Intervenor Counties prevail on appeal." The White Earth Band filed cross-appeals on certain portions of the District Court's decision on the merits of June 25, 1981.

The Court of Appeals by order of May 14, 1982, affirmed both the District Court preclusion order and its opinion on the merits. After obtaining an extension of time from this Court, Mahnomen and Clearwater Counties, et al., (but not Becker County), filed a Petition for Writ of Certiorari on September 10, 1982. The State by this Cross-Petition adopts a position identical to its position in the Court of Appeals. The limited purpose of this Cross-Petition is to preserve the State's rights from *res judicata* under the *Moitie* decision should Mahnomen and Clearwater Counties prevail on their petition. Becker County joins the State in filing this Cross-Petition for limited purposes.

The history of the White Earth Reservation, the Statutes which affected it, and its current characteristics have adequately been described in the Petition for Writ of Certiorari of Mahnomen and Clearwater Counties, et al. Particularly in light of the limited nature of this Cross-Petition, that history and factual background will not be repeated here.

REASONS FOR THIS CROSS-PETITION

The District Court by order of May 30, 1980, granted the Band's motion to preclude relitigation of issues decided by the Minnesota Supreme Court in *State of Minnesota v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied*, 445 U.S. 904 (1980). In *Clark*, the Minnesota Supreme Court held that thirty-two townships of the original White Earth Reservation were never disestablished and that therefore the State was without authority to regulate hunting and fishing activities of White Earth Band members within those townships.

The State did not actively oppose the Band's motion for preclusion. The reasons are best set forth in the State's memorandum of March 21, 1980, to the District Court:

> The Minnesota state defendants during the early stages of the above actions [the state court cases consolidated in *State of Minnesota v. Clark*] urged the Court not to proceed with consideration of the cases because similar issues were being litigated in state courts. The state defendants represented that the issues would be timely tried in state court and that therefore this court should refrain from consideration of those issues. In light of these previous representations, the state defendants do not feel they can urge the Court at this time to take action which they argued earlier was not warranted. Therefore, the Minnesota state defendants do not here take a position actively opposing the motion for preclusion.
>
> It should be emphasized, however, that the Minnesota state defendants are not thereby arguing that as a matter of law the Court has no authority to consider the disestablishment issue. In this regard the analysis of the interven-

ing counties in their memorandum in opposition to preclusion is correct. Should the Court determine in its discretion to hear evidence on the disestablishment effect of the Nelson Act, the state defendants would participate fully in the matter.

After the preclusion order was appealed to the Court of Appeals by Mahnomen, Clearwater, and Becker Counties, the State also appealed in order to protect itself from possible future *res judicata* arguments based on the recent decision in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981). Under this Court's rationale in the *Moitie* case, it appeared that if the State had not appealed and the preclusion decision were reversed, the State in future proceedings in the case could possibly have been prevented from questioning the status of the thirty-two reservation townships.[2] If the Counties were to succeed on the merits of the thirty-two township issue, it could have led to the convoluted situation of the entire reservation being disestablished as to the Counties but, because of *Moitie*, not as to the State. It was to prevent such a situation from ever occurring that the State cross-appealed to the Court of Appeals on the preclusion (or collateral estoppel) issue.

The State's position here is similar to its position before the Court of Appeals. If the question of reservation disestablishment is opened up again (should Mahnomen and Clearwater Counties prevail in their arguments to this Court), it would make no sense to prevent the State from questioning the reser-

[2] The State had argued in *State of Minnesota v. Clark*, 282 N.W.2d 902 (Minn. 1979), that state game and fish laws applied to Indians on all non-trust lands within the original reservation because the whole reservation had been disestablished by the operation of the Nelson Act and the allotment process.

vation status also. Yet that seems to be the implication of *Moitie* if the State were to decline to file a petition to this Court. Thus, in order to protect itself from possible *res judicata* problems, the State feels bound to cross-petition here.

Becker County, which appealed the District Court's preclusion order to the Court of Appeals, chose not to submit an original Petition for Writ of Certiorari to this Court on that issue. However, when Mahnomen and Clearwater Counties, et al., filed their Petition, Becker County was put in the same situation with regard to potential *res judicata* problems as the State. Therefore, Becker County decided to join this limited Cross-Petition in order to protect its future rights.

Since the purpose of the Cross-Petition is limited as explained above, this document will not discuss in detail the merits of the preclusion (or collateral estoppel) issue. Mahnomen and Clearwater Counties present a complete argument in their Petition. Although the State and Becker County have limited reasons for filing this Cross-Petition, that fact should not be construed as a concession that the District Court's decision on the merits of the preclusion issue is correct. Rather, the limited Cross-Petition by the State represents its decision to abide by its earlier arguments, representations, and promises to the District Court. The limited Cross-Petition by

Becker County represents its desire to avoid being penalized in the future for deciding, for its own reasons, not to initially petition this Court to review the preclusion issue.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
JAMES M. SCHOESSLER
Counsel of Record
Special Assistant
Attorney General
Third Floor, Centennial
Building
St. Paul, MN 55155
Telephone: (612) 296-3294
Counsel for Cross-Petitioners